



Telecommunications reform in Fiji, Samoa and Vanuatu and the credibility problem: the impact of independent regulators

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While there has been much fanfare about the early outcomes of telecommunications reform in Fiji, Samoa and Vanuatu, less attention has been given to the regulatory challenges these countries encountered in the early stages of the reform programs. This study examined the role and effectiveness of independent regulators through comparative case study analyses of the three countries, based on insights drawn from semi-structured interviews with telecommunications officials, operators, regulators and users. It found that the early regulatory reforms in the Pacific showed evidence of 'regulatory capture' through legislative amendments and political influences on the operation of the office of the regulator. Further, the reliance of independent regulators on the national parliament's budget appropriation and the lack of technical and financial resources imposed burdens on the independent regulators. On the other hand, the study found that the legal contractual agreement—the deed of settlement—signed between governments and the incumbent telecommunications operators and competition from new entrants provided immediate policy certainty to the reform process and catalysed the finalisation of the reform package.

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The recent telecommunications regulatory reforms in Samoa, Vanuatu and Fiji were driven predominantly by the political will of governments to deregulate their telecommunications markets and allow access to

cheaper and better-quality telecommunications services. The entry of the private telecommunications operator Digicel Pacific Limited, however, intensified the commitment to pro-competitive market reforms.



While there has been much fanfare about the early outcomes of the telecommunications reform processes in these Pacific island states, less attention has been given to the regulatory pitfalls and challenges the countries encountered in the early stages of their reform programs. This article contributes to the literature on regulatory reform by addressing one fundamental regulatory challenge: the process of negotiating the terms and conditions, including forms of compensation, for the premature termination of the exclusive rights of the incumbent monopolies.

This study examines this regulatory challenge based on one key proposition: that domestic policy restraints in the form of independent regulators are vulnerable to capture, thereby undermining the credibility of telecommunications reform processes.¹ The analyses of the process of ending monopoly rights from the case studies of Samoa, Vanuatu and Fiji provide crucial insights into the role and effectiveness of independent regulators during the reform process. The case studies provide evidence that the effectiveness of independent regulators in providing policy credibility in the early stages of reform has been limited. The reasons are twofold. First, the independent regulators had limited technical capacity and financial resources. Second, the independent regulators were vulnerable to political influence. On the other hand, the case studies of Vanuatu and Fiji give support to the crucial role of contractual agreements—deeds of settlement²—in providing immediate credibility in the early stages of reform. The long-term viability of such legal mechanisms instead of development of a comprehensive and appropriate regulatory framework is, however, unclear.³

Section two of this article discusses the role of the independent regulators in Samoa, Vanuatu and Fiji. Section three examines the role of the independent regulator and

the deed of settlement in the negotiations over breaking the exclusive rights of the incumbent operators. Section four examines the impact of independent regulators and the deed of settlement on the credibility of the telecommunications reforms.

Independent regulators

Samoa

One of the fundamental components of Samoa's telecommunication reforms was the implementation of comprehensive telecommunication legislation (the *Telecommunications Act 2005*) in June 2005. The new telecommunications legislation set out the key regulatory components of a competitive market—in particular, the establishment of a regulator's office to oversee the regulation of a competitive telecommunications sector.

The role of the regulator is defined in Part II, Sections 6–11 of the act. Section six of the act provides the right for the head of state, acting on the advice of cabinet, to appoint a regulator for a term of three years (with possible extension for a second term). Section seven provides for the 'independence' of potential candidates considered for the regulator's position, who may not be involved in or have 'proprietary interest' in a service provider, manufacturer or supplier of telecommunications equipment. Section eight outlines 22 responsibilities, functions and powers of the regulator. The regulator's basic role is to: provide advice to the minister responsible for telecommunications on relevant policies; issue, amend or revoke licences; monitor and enforce compliance; regulate interconnection agreements between operators; resolve disputes; and institute and maintain appropriate measures to prevent dominant operators from anti-competitive behaviour. Section nine provides the rights to establish



the office of the regulator. The regulator's budget is appropriated from the government's national budgetary expenditure. The regulator is also required to 'conduct its affairs' and provide information to the general public in an open and transparent manner. Section 10 provides the authority for the regulator to propose a regulation to establish licence fees, radio spectrum usage fees and numbering fees. Section 11 provides for the rights of appeal and review of orders of the regulator.⁴ This section provides the right for operators to dispute directly to the Supreme Court any order made. An amendment to the act in 2008, however, amended this clause by referring any dispute to a telecommunications tribunal rather than to the court system.

The regulator's office was established in 2005 with seven officers. An interim regulator was appointed to act in the position while a permanent appointment was sought. In 2008, another interim regulator was appointed. On 16 February 2009, a permanent regulator was appointed. Four professionals and three administrative staff run the Office of the Regulator. A legal analyst and three technical officers operate under the direction of the regulator. The office's fund for the financial year 2008/09 was T1,402,230 (approximately US\$526,000), of which 54 per cent was for wages (Legislative Assembly of Samoa 2009).

Fiji

As enacted by promulgation in 2008, regulation of the telecommunications sector in Fiji is shared in principle by two independent statutory authorities: the Commerce Commission and the Telecommunications Authority of Fiji (TAF). The Commerce Commission, established under the *Commerce Act 1998*, is the independent statutory authority regulating competition and price-control policies on monopolies. Section 11 of the act states that the '[c]ommission is

not subject to the control or direction of the Minister or to any referring authority in the performance of its functions'. This provision arguably provides for the independence of the Commerce Commission from ministerial or governmental interference. The commission consists of three and not more than five commissioners with a chairperson, all appointed by the minister. The commission's budget is appropriated by parliament. The minister reserves the right to remove from office any member of the commission for misbehaviour, incompetence or incapacity.

TAF was created by the Telecommunications Promulgation 2008, approved in January 2008 by the military government. The 2008 promulgation aimed to provide a regulatory framework for telecommunications, promoting fair competition, consumer protection and efficient investment measures. TAF is to be responsible for licensing arrangements, spectrum management, the telecommunications numbering system, universal services and a Telecommunications Appeal Tribunal. Division 2, Section 4 of the promulgation gives legal rights to the independence of TAF, stating that members are to be 'independent and impartial in the exercise of their functions and represent the public interest'. The minister has the right to remove any member on the grounds of misconduct, conflict of interest, inefficiency, fraud or dishonesty or incapacity to perform duties. The funding of TAF is to be appropriated by parliament.

As of December 2009, TAF is not operational. Once operational, however, the two authorities should complement each other, with competition and pricing policies regulated by the Commerce Commission and licensing, spectrum management, numbering and universal service to be handled by TAF.



Vanuatu

The Office of the Regulator was established by an amendment (*Telecommunications Amendment Act No. 15 of 2007*) to the *Telecommunications Act 1989*. The amendment grants two fundamental powers to the minister to regulate (or delegate to appropriate people the power to regulate) the telecommunications sector and the power to make determinations over disputes relating to interconnection between operators. An interim regulator was appointed in February 2008 for 12 months and the Office of the Regulator was staffed with two permanent and two part-time technical staff.

The regulator's responsibilities are not reflected in the *Telecommunications Act 1989* (and subsequent amendments), but rather are dictated by three fundamental, legally binding documents. First, the regulator's employment contract outlines key responsibilities and other duties delegated by the Minister for Infrastructure and Public Utilities. Second, the 'deed of settlement', which ended the exclusive state monopoly and was signed by operators and the government, outlined the regulator's role on monitoring licensing, spectrum management, the numbering system, interconnections agreements and mediation in the case of disputes. Third, the new licences granted to Telecom Vanuatu Limited (TVL) and Digicel also reflect specific rights and powers of the regulator.

A new Telecommunications and Radio-communications Regulations Bill (2009) which effectively consolidates the key responsibilities of the regulator is being circulated for public consultation. Other telecommunications regulatory aspects such as universal service funds, anti-competitive behaviour, spectrum management, interconnection agreements and the numbering system are not addressed in the current

Telecommunications Act 1989 (and subsequent amendments). These key regulatory principles are addressed in the draft bill. A regulatory official in Port Vila explained that

we are operating under the *Telecommunications Act 1989* (as amended). The government is planning to introduce a new Telecommunications Bill, which will include several changes. Since it was drafted 17 months ago [2007], the government has already made a number of changes to its policies. For example, in the settlement agreement and licences for TVL and Digicel, there are certain provisions that are in conflict with the bill, so that needs to be harmonised. It is a bit odd making the laws consistent with the licence rather than the licence consistent with the laws. The consumer protection and anti-competitive measures have been written into the licences instead of the law. So that is the environment that we are operating from at the moment [up to September 2009]. (Respondent six, fieldwork interviews, 11 August 2008)

The regulator's office in Vanuatu relies heavily on donor funding, while in Samoa and Fiji, the offices are funded by the government. Samoa and Fiji have enacted modern, comprehensive telecommunications legislation, including the responsibilities of independent regulators. The independence of all three regulators is designated by law or by contractual arrangement.



Breaking exclusive rights on telecommunications: the roles of independent regulators and the deed of settlement

This section discusses early policy motivation in terminating exclusive state monopolies in the three countries, the role of the independent regulator throughout these processes and the terms of the deeds of settlement.

Samoa: the independent regulator and the interconnection dispute

Three mobile service operators won licences to operate in Samoa after the public bidding for mobile services in early 2006: Digicel, SamoaTel and TSL. Digicel was granted a licence in April 2006 but, through a business move, it acquired 90 per cent ownership of TSL, effectively inheriting TSL's licence and entitlements.⁵ The mobile sector was set for competition when Digicel launched in November 2006 and SamoaTel's 'GoMobile' launched two months later. One of the contentious issues for the two operators was establishing an interconnection agreement.⁶

Preliminary discussions between the two operators were not fruitful. In October 2006, the two operators informed the interim regulator that they were unable to reach an agreement on interconnection rates and requested that the interim regulator set interim interconnection charges. The interim regulator issued interim interconnection rates for fixed and mobile services effective from 31 October 2006.

The interim interconnection rate was imposed for four months and two weeks. During that time, the two operators were required to undertake individual, cost-based interconnection studies to be submitted by March 2007.⁷ During the interconnection dispute, the general counsel for Digicel

explained that 'cost based' 'implies that the interconnection charges of a dominant provider⁸ shall be based on their costs of providing interconnection services and shall be economically viable' (Supreme Court of Samoa 2008:3). A UK consulting firm (Intercai Mondiale Limited, IML) was contracted by the Government of Samoa to assist the interim regulator in determining interconnection rates.

The operators might, however, have ignored the interim interconnection rates order (2006/4). An Education, Science, Communication and Information Technology Committee review into the interconnection rates of the two operators on 1 March 2007 noted some inconsistencies between the tender prices and the real mobile rates. One of the committee's findings noted 'concern with the increase in cell phone charges per minute by Digicel and SamoaTel. They both are not complying with amounts they tendered for when they applied for a licence to provide cell phone services' (Lesa 2007:4). As reported in the *Samoa Observer* (11 July 2007), the chairman of the committee and opposition MP, Levaopolo Talatonu, 'accused both companies of misleading the Tenders Board by submitting tender rates cheaper than what they currently charge'. The chairman was also reported as saying that 'the licences granted to these companies were given because of the rates they submitted. We all know that both companies are charging rates far off the mark' (Lesa 2007:1). No action was recorded as being taken by the interim regulator in relation to these price discrepancies.

The interim regulator, Digicel and SamoaTel communicated frequently during November and December 2006 on the details of the cost model. The regulator collected information from both parties through submission of comments on the regulator's cost-based modelling proposals



and the operators' modelling. The regulator issued a cost study outline, *Samoa Guidelines*, on 11 January 2007, prescribing the key ingredients of the cost studies that each operator should address.

Having in mind the deadline for the cost studies of 11 March 2007, the regulator consistently pressured the two operators to submit their cost studies. SamoaTel submitted its cost model on 19 March 2007 and a revised version on 22 March 2007. Digicel submitted on 27 March 2007. IML required further 'supporting documents' from Digicel's cost study. The regulator, however, was not satisfied with the supporting documents.

The interim regulator instructed IML to construct its own model of Digicel's costs, based on a different model from the one in the *Samoa Guidelines*. On 15 May 2007, the final report with recommended interconnection rates was submitted by IML to the regulator and on 16 May 2007, the regulator sent the new interconnection rates to both operators. Digicel was not happy with the new rates.

In the light of potential revenue loss for Digicel, it sought an appeal in the Supreme Court against the interim regulator's order. The main argument used was the failure of the interim regulator to accord procedural fairness to Digicel when conducting the process of establishing the interconnection rates. The Supreme Court's judgment was announced on 30 March 2008. The Supreme Court ruled that Digicel's appeal against the regulator's interconnection order was allowed and the order was declared unlawful. The cost of the litigation imposed on the regulator and subsequently paid by the government was quoted as T1 million (about US\$385,000). An agreement between the regulator and the two operators to revert to the interim interconnection rates (2006/4) was reached, with the two operators to make further submissions to the regulator. By

September 2008, the regulator approved a new interim interconnection charge.

The outcome of the interconnection dispute favoured Digicel, although the regulator's intention was to ensure prompt decisions on interconnection rates in the public interest. The urgency by the regulator could, however, have been the result of pressure from a third party. Overall, the interconnection dispute reflected the limited technical capacity of the regulator's office and its inexperience in handling disputes of this nature.

Vanuatu: the independent regulator and the deed of settlement

Pre-competition regulatory framework.

One year before Vanuatu's independence in 1980, VANITEL was established as a private operator delivering international telecommunications services, while the government-owned Vanuatu Post & Telecommunications provided the domestic services.⁹ When developing countries in the 1980s and 1990s reformed their telecommunications sectors by way of privatisation, Vanuatu adopted similar policy directions. In 1992, Vanuatu adopted a privatisation program for telecommunications, whereby VANITEL and Vanuatu Post & Telecommunications merged and formed an incorporated company, Telecom Vanuatu Limited (TVL). TVL was granted exclusivity to provide all telecommunications services. A 20-year franchise agreement was signed, with the government, Cable & Wireless and France Telecom having equal shares. TVL initially established its infrastructure network in the main towns. Copper wire (fixed lines) was the primary communication channel and cross-subsidisation of the main urban area network enabled limited expansion to rural areas. A telecommunications official in Vanuatu stated that 'the main aspect of the agreement was the exclusivity allowing TVL to run on a commercial basis



and make profit out of Port Vila, Luganville...the main towns, and cross-subsidise the rural areas' (Respondent 25, fieldwork interviews, 20 August 2008). TVL, however, soon encountered challenges that hindered its rural development program. The same telecommunications official in Port Vila stated that 'in the last two years [2006–07], the government has changed direction. They decided that it is about time to introduce competition. There are number of reasons for that but most noticeable were pricing and rural coverage' (Respondent 25, fieldwork interviews, 20 August 2008).

Breaking exclusivity rights—negotiations versus court settlement? Public pressure to reform the sector grew over time. Three incidents deserve further discussion. First, when Vanuatu withdrew its World Trade Organization (WTO) accession package in 2001, several reasons—mainly political—were cited (Gay 2005). One of the fundamental issues, however, was the issue of committing the telecommunications sector in Vanuatu's services offer ('Ofa 2008). Grynberg and Joy (2000:171), discussing Vanuatu's terms of WTO accession, write that 'the United States has added a further demand for the opening of the telecommunications sector. In Vanuatu this is not legally possible as with the condominium arrangement France has an ironclad "gateway monopoly" until 2012.' The Vanuatu government at the time considered the cost of opting out extremely high, although the policy direction was towards liberalising the sector.

Second, the 'ironclad gateway monopoly' was legally tested between October 2005 and September 2006 when the government granted a private company (Pacific Data Solution, PDS) a telecommunications licence to operate an electronic-gambling service to a closed-network client (Supreme Court of the Republic of Vanuatu 2006). The incumbent monopolist, TVL, legally challenged the government's decision to grant a licence

on the basis that the franchise agreement granted exclusive rights to TVL to operate all telecommunications services in Vanuatu. The court ruled otherwise, however, stating that the government's decision was legal since the licence given to PDS was to a restricted e-gambling network rather than the general public. A government official in Port Vila stated that 'at that time and through that process of the initial decision and the appeal, the question of the whole future of the Telecommunications sector came to a head' (Respondent 22, fieldwork interviews, 14 August 2008).

The third and probably most crucial incident was the government's 2006 information and communications technology policy paper and the amendments to the *Telecommunications Act 1989*. Through its policy paper, the government signalled its intention to liberalise the market. A government official in Port Vila recalled that 'the policy paper was discussed in Parliament. When we were involved with the court case, revision was undertaken to the *Telecommunications Act 1989* to allow granting of licences to new operators' (Respondent 26, fieldwork interviews, 20 August 2008).

Part 3, Section 16(6) of the *Telecommunications Act 1989* states that the minister has the right to grant a licence for the provision of public domestic and public international telecommunications services 'provided that at one time in Vanuatu there shall be no more than one telecommunications system in operation to provide public international telecommunication service and no more than one telecommunication system in operation for the public national telecommunication service'. Condition 2.1 (Supreme Court of the Republic of Vanuatu 2006) of the franchise agreement between the Government of Vanuatu and TVL stated that

subject to the terms and conditions of this licence, the Minister hereby



grants to the Company [TVL] the sole rights...to provide, operate and develop, and the Company shall provide, operate and develop, the Public Telecommunication System of Vanuatu and further to be the exclusive provider of Public Telecommunication Services in Vanuatu.

It was apparent that to end prematurely the exclusive rights enjoyed by TVL, all stakeholders had to negotiate the terms of the franchise agreement that legally bound the government, Cable & Wireless and France Telecom. Negotiating to end the franchise agreement, however, as indicated earlier by the experience of Vanuatu's 2001 WTO accession package, was extremely costly for the government. A government official in Port Vila stated that 'the prevailing wisdom was that TVL's monopoly was contractually solid. It was thought that because of the franchise agreement, there was absolutely nothing the country could do to liberalise telecommunications unless with the consent of TVL (Respondent 22, fieldwork interviews, 14 August 2008).

Further, TVL initially requested monetary compensation for any loss of exclusivity. The limited public funds to pay compensation could have compelled the government to pursue negotiation of a deed of settlement. It might not, however, have been the only stakeholder to favour such an option. The two other stakeholders, Cable & Wireless and France Telecom, could have incurred costs if they had attempted to protect their exclusivity through the courts. The franchise agreement was not as 'ironclad' as previously thought. A 2000 Privy Council decision from Dominica's Court of Appeal, known as the 'Marpin decision' (Court of Appeal 2000), ruled that an exclusive telecommunications monopoly held by Cable & Wireless Dominica Limited infringed on Dominica's freedom of speech

as guaranteed by Dominica's constitution. A similar defence was arguably possible for the Vanuatu government to exploit if it had to go through the court system.

Fiji: the Radisson accord

Pre-competition regulatory framework: 2005 road map. The move for comprehensive regulatory reform in the telecommunications sector was a long-term policy direction tracing back to 2003. A World Bank mission in 2003 and a case study of Fiji's telecommunications sector by the International Telecommunications Union (ITU) in 2004 indicated that the major impediment to the telecommunications sector's performance was exclusive rights (Fiji Ministry of Information, Communications and Media Relations 2005:7). The Laisenia Qarase government's Minister for Information, Communications and Media Relations, Marieta Rigamoto, in a workshop in Suva on the 'Road Map for Telecommunications Sector Reform' in December 2005 acknowledged that

several analyses indicate that the current sector structure and rigid licensing regime, with technological restrictions—operators with exclusivity in particular market segments such as domestic fixed, international fixed, mobile, and internet—have hampered service provision. The rigid structures impede beneficial use of emerging and quickly changing technologies, and do not take account of convergence between telecommunications, internet and media. (Ministry of Information, Communications and Media Relations 2005:2–3)

The 2005 Road Map for Telecommunications Sector Reform outlined the updating of the 1998 telecommunications policy,¹⁰ the establishment of TAF and the ending of exclusive licences. The plan for ending



exclusive rights in the telecommunications market encountered two regulatory challenges. The market in Fiji was artificially dissected in that each key subsector held exclusivity rights: FINTEL held international services, Vodafone held mobile services and TFL held domestic services. Any deregulation plan would therefore involve three sets of negotiations for the three operators, rather than one.

A legal dispute ignited in December 2005 between the government and Vodafone, based on the road map's direction for the government to grant mobile licences to potential new competitors (High Court of Fiji 2005). Vodafone challenged these plans based on the argument that it had inherited (sub-leased) the exclusive mobile licences from its parent company, TFL. The High Court acknowledged that the granting of exclusive mobile rights by TFL to Vodafone had been consented to by the government, which provided a strong basis for Vodafone's argument. The High Court was, however, unsure about the legality of the inherited exclusive rights as the *Telecommunications Act 1989* authorised only the minister to grant licences. Similar to the Vanuatu negotiations, the Fijian government used the Marpin case in Dominica (though it was not exploited to its full potential) in the attempt to justify its deregulation road map. The High Court's decision of 20 December 2005 and also the Court of Appeal decision (Court of Appeal Fiji Islands 2006) dated 28 July 2006 both granted decisions favouring Vodafone maintaining its exclusive licence.

Deed of settlement: Radisson accord.

The coup d'état led by Commodore Bainimarama in December 2006 catalysed the progress of the reform. Digicel had expressed interest in entering the market. Digicel had been talking with the ousted Qarase government. The interim government reopened a tender process for expressions of interest in

the mobile service sector. The interim government, together with the exclusive rights holders of telecommunications services, arranged for a conference to negotiate the details of deregulation. The series of meetings between the stakeholders was held at the Radisson Fiji Resort in Nadi.

The interim government was in no position to grant monetary compensation for prematurely ending the monopoly rights, and hence chose to pursue the negotiations path. The complexity of the market structure meant that a negotiated resolution was going to be difficult to achieve. The deed of settlement was a complex set of arrangements for the ending of exclusivity for the incumbent holders in return for short transitional periods. Vodafone Fiji Limited's exclusive licence for mobile service was to end by 30 September 2008 (about a nine-month transitional period). Vodafone Fiji Limited in return was to receive a 15-year open licence to operate in any of the sectors (subject to the transitional periods granted to FINTEL and TFL). TFL also received a 15-year open licence but would not be allowed to operate in the mobile service sector 'as long it has direct economic interests in Vodafone Fiji Ltd' (Baselala n.d.) in order to avoid potential abuse of market dominance. TFL was allowed to establish its own international gateway, subject to an 18-month transitional period granted to FINTEL, which ended in July 2009. FINTEL also received an open licence and was allowed to operate in all sectors. The new entrant, Digicel, was granted an open licence to operate in the mobile service sector from October 2008 onwards, subject to the transitional period restrictions offered to the incumbents.



Overall, the 'Radisson accord' achieved its first objective, which was to end monopoly rights in the telecommunications market. The Radisson accord is crucial as it sets forth the legal arrangements and responsibilities for all operators and stakeholders in the market for the next 15 years. The 15-year licence, coupled with other telecommunications principles outlined in the deed of settlement, provided some certainty to the telecommunications sector.

The next section discusses the impact of independent regulators and deeds of settlement on the credibility of telecommunications regulatory reforms in Samoa, Vanuatu and Fiji.

Credibility of telecommunications reforms: the impact of independent regulators and deeds of settlement

Samoa: the independent regulator

The outcome of the dispute did not go down well with the government. A government official in Apia hesitantly commented that 'although we did not get the outcome from that case we [wanted]...the regulator acted independently and tried his best in resolving the differences between the two operators' (Respondent 14, fieldwork interviews, 22 July 2008). The T1 million court cost was a major blow but the fact that a private foreign company took a statutory arm of government to court and won convincingly created some bitterness. A regulatory official in Apia commented that 'the question of the case...was one of procedure and also I think one of transparency...the government has every right to be shaken up because it is not just Digicel that can take them to court but any entity or player within the sector' (Respondent seven, fieldwork interviews, 15 July 2008).

The prospect of potential future litigation against the regulator, indirectly affecting the government, could have forced some consideration of key provisions in the legislation. Amending the telecommunications legislation, however, might not be an appropriate solution to the problem. A regulatory official explained that

even if you try to put all these regulatory policies—establish an independent regulator, set up a universal fund, competition policy, an interconnection agreement, and so on—in place before the market is liberalised, it is only when the market starts to operate that you observe how operators react to the policy framework put in place [and] that you understand how the sector is developing. The principle may be sound but the application of how they are actually designed to work may not yield the outcome that was originally envisaged. (Respondent eight, fieldwork interviews, 15 July 2008)

Parliament passed an amendment to the *Telecommunications Act 2005* in June 2008. The 2008 amendment influences the act in four fundamental ways. First, an appeal to the order of the regulator 'may only be made to a Telecommunications Tribunal'. The original section 11 says that an appeal from an order of the regulator may be made only to the Supreme Court. A Telecommunications Tribunal was also to be set up, with a judge or lawyer, to be appointed by the Chief Justice, and two other members. Second, the government was to be exempted from the payment of any costs associated with any tribunal proceedings. Third, the decision of the tribunal is final and binding on all parties. Further, any appeal of the tribunal's decision may not be filed in any court. Fourth, the regulator's discretion



in determining interim interconnection charges was further refined to grant more powers to the regulator to determine and impose interim interconnection rates on operators in the case of operators failing to reach an agreement on interconnection within two weeks.

The outcome of the interconnection dispute highlights three fundamental issues: first, the susceptibility of policymakers to make changes in policies and legislation in order to avoid future litigation costs. Second, the dispute highlighted weaknesses in the process of setting up and implementing the regulatory framework in the appropriate sequence. Third, the capacity of the regulator's office to deal with complex issues such as determining interconnection rates, spectrum management, numbering systems, setting up competition policies and articulating and justifying the regulator's position during negotiations with operators is crucial. A telecommunications official stated that 'to regulate the telecommunications sector in Samoa, you need a person with great breadth of skills and it is very difficult to find anyone who is willing to come and live in Samoa and do that work' (Respondent 16, fieldwork interviews, 23 July 2008).

Overall, the case of Samoa shows that regulatory policies have been changed such that they could hamper a private investor's ability to seek legal justice. Further, there is evidence that the strong political will of the government to move swiftly towards a liberalised market could have come at the cost of the independent regulator's office lacking technical experience and financial resources. The resulting uncertainties could lead to more frequent disputes and litigation.

Vanuatu: the independent regulator and the deed of settlement

The World Bank facilitated the negotiations over the deed of settlement in Vanuatu. The

negotiations took more than 12 months (2006–07). The deed of settlement covered six fundamental issues. First, it was required that TVL forgo the remainder of the term of its protected licence (2008–12). In return, the government agreed to transfer its shares (33.33 per cent) equally between Cable & Wireless and France Telecom and establish TVL as a private company with 50–50 partnership. Third, the deed of settlement provided for the establishment of a regulator. Fourth, a universal service fund was to be established from the contributions of all operators, based on a percentage of their annual revenues. Fifth, certain commercial concessions would be made available to all operators—for instance, import duties were to be exempted on all capital goods imports. Sixth, an interconnection agreement was to be established before operations began.

Four issues in the deed of settlement require further discussion. First, both telecommunications operators, particularly the incumbent, were keen on establishing a regulator. A telecommunications operator in Port Vila explained that 'we negotiated aggressively with the government to ensure the establishment of a full independent regulator. We wanted a very good referee and a level playing field. Without that, TVL would not have given up its exclusivity rights' (Respondent 25, fieldwork interviews, 20 August 2008). TVL saw the establishment of a regulator's office as 'protection' for them. A regulatory official explained that 'TVL wanted to see a regulatory framework in place, based on fair trading practices. It is unusual for a monopoly to seek that kind of protection, because normally the monopoly is the player that can abuse its dominant market position' (Respondent 19, fieldwork interviews, 11 August 2008).

According to respondents, the new competitor also valued the establishment of an independent regulator. The interim regulator has been effective in areas such



as building the office's technical capacity (two local, part-time employees with technical expertise in radio licensing and radio spectrum have been recruited). A web site (<http://www.telecomregulator.gov.vu>) for the telecommunications regulator has been established, providing crucial public information about government policies and the regulator's decisions. The office has also been effective in providing mediation in negotiations between the incumbent and the new entrant.

Second, the government drew up an interconnection agreement between operators for the operators to sign before any licence was granted. Normally, the interconnection agreement is negotiated between operators after licences have been granted and is usually a point of dispute between the dominant market player and the new entrant. The government's initiative in drawing up its own interconnection agreement does appear to have minimised disputes between operators. A regulatory official best captured the dynamics of the government's intentions

The government did something that was quite smart in the process of setting up the licence and the settlement agreement... The government offered the interconnection agreement to TVL and Digicel as part of their commitments in the deed of settlement. Since government compensated TVL by giving up its shares, it asked TVL to be willing to sign the interconnection agreement. Similarly with Digicel, it wanted a licence... and so government was very careful not to grant Digicel a licence until they also agreed to sign this interconnection agreement. There was never a negotiation between TVL and Digicel on the interconnection agreement. (Respondent 19, fieldwork interviews, 11 August 2008)

The pre-setting of an interconnection agreement as part of the deed of settlement was one of the regulatory policy successes

in the Vanuatu reform. It provided certainty to the market by ensuring that both licensees were aware of the interconnection tariffs to be used.

There was opposition to the government's decision to divide its TVL shares equally between Cable & Wireless and France Telecom. As reported by the *Vanuatu Daily Post* (2 April 2008), 'the decision to give away VT1 billion shares in TVL was bad business. The opposition questioned the sort of agreement negotiated with TVL for the acquisition of government interest. They also said that the divesting of state assets in highly profitable entities for nothing or negligible benefit is without doubt bad business.'

Perhaps crucial to the government's general revenue was the immediate loss of revenue from its shares in TVL. A government official explained that

the government seriously considered the implication of revenue loss from forgoing the shares. However, when we did our analyses, the government found that we will actually be earning more due to the two telecommunication operators' payment of value-added tax. The licence alone would generate roughly V50 million. The Deputy Prime Minister [now Prime Minister] presented the bill and everyone supported it, even the opposition. (Respondent 26, fieldwork interviews, 20 August 2008)

A closer look at the government's TVL dividend payments, however, shows a different story. From 2000 to 2006, TVL paid the government an average of V48 million annually. The highest dividend recorded was in 2006: V103 million. The average and the highest-ever dividend amounts were nowhere close to the V1 billion claimed. Further, in comparison with the government's revenue in the period 2000–06, the



average revenue contribution by TVL's dividend was 1 per cent of the total annual government revenue.

Further, several stakeholders within the government thought that signing a cashless deal was a well-negotiated deal. A government official recalled that

returning the shares was the price of escaping the monopoly, which was disadvantageous to consumers and massively restrictive of national development. So some might think it is a very small price to pay. There has been some adverse political comment about the terms of the settlement. In my respectful opinion, those political comments were uninformed. It has to be pointed out that initially, TVL sought monetary compensation for any deregulation of the industry. So to have signed a deal that does not involve any payment by government might be thought to have been well negotiated. (Respondent 22, fieldwork interviews, 14 August 2008)

The minister responsible for telecommunications, Edward Natapei, also played a crucial role in the reform program. A regulatory official said that Natapei 'is the champion of the telecommunications reform in Vanuatu. I don't think that it was widely held in government that telecommunications reform was [necessarily the] right path to go [down] but he held [the] necessary power and commitment to bring it through' (Respondent 19, fieldwork interviews, 11 August 2008).

Fourth, the World Bank and AusAID were instrumental in the reform process. The Vanuatu government had limited technical capacity in telecommunications. AusAID provided valuable assistance in funding legal expertise and capacity building. The World Bank provided strategic advice on how to approach the reform process. It

also provided assistance with mediation to get the parties talking. Currently, they are developing regulatory capacity and will be providing a longer-term program of support. It was constructive donor collaboration.

Overall, the negotiations that led to the deed of settlement for ending the monopoly rights of TVL were the vital instruments in providing certainty to the regulatory reform process. As of September 2009, the comprehensive telecommunications bill that encompasses the key regulatory principles for an independent regulator has not been enacted, yet these principles are legally incorporated in the contractual arrangements. This unprecedented regulatory move could be well justified, as it has allowed instant and ample flexibility for the operators and the government to terminate exclusivity and allow competition to flourish without prolonged political debate. The regulatory vacuum, however, could pose institutional uncertainty in the long term when market operators play in a market that is based largely on contractual rather than a mainstream regulatory policy framework. Further, the problem of supply-side constraints—particularly technical expertise and the financial means of the government to establish and maintain an independent regulatory body—should be flagged. The effectiveness of the independent regulator depends on the capacity of the office to undertake in-depth economic analyses and modelling of price and cost structures of operators and its ability to validate price structures and coverage. The financial and technical assistance provided by donors facilitated this process, but its long-term sustainability could be in question.



Fiji: the independent regulator and the deed of settlement

As mentioned earlier, TAF is not yet operational and the Commerce Commission continues to provide a majority of the regulatory functions in the telecommunications sector. The effectiveness of the Commerce Commission during and after the telecommunications reform has been mixed. One of the early contributions by the Commerce Commission in the move to deregulate the telecommunications market was the determination of prices of telecommunications services across the sector in 2005. A regulatory official in Suva recalled that

over the years, the operators were never regulated [on prices]; no-one determined the prices for their services. There were a lot of complaints from foreign investors who wanted to come in [but could not], because the cost of establishing a business was very high and telecommunications [costs] contributed significantly to that high cost. So that triggered the commission to look at the prices of telecommunications charges across the sector and to some extent [it] did manage to reduce the prices of telecommunications overall. (Respondent 31, fieldwork interviews, 20 November 2008)

A further price review was undertaken in 2008, resulting in a further reduction in prices.

These reviews, however, raised two fundamental challenges for the commission. First, the financial information made available to the commission by the incumbents on which to base its price determinations was limited. Second, the commission did not have the technical capacity to deal with the complex exclusivity arrangements of the three monopoly operators in

the price review processes. Furthermore, anecdotal evidence from the fieldwork and the regulatory policies implemented suggests that political influence hampered the independence of the regulatory entity. For example, whether intentional or not, the Telecommunications Promulgation of 2008 did not have one fundamental component: the establishment of an independent regulatory body, TAF. The reasons for the delay were based on administrative and logistical challenges. Perhaps the slow progress is understandable as the powers granted to the independent regulator under the promulgation are significant—in particular, the power to grant telecommunications licences, which was previously held by the minister responsible for telecommunications.

Further, in the period 2008–09, the Commerce Commission encountered internal controversies, including the chairman's contract being prematurely terminated by the government. The chairman had been the interim government's lead representative in the negotiation of the Radisson accord.

The interim government's heavy influence on the regulatory body is no surprise since the regulatory body is heavily reliant on public funding. The Commerce Commission was temporarily closed in September 2008. The *Fiji Times Online* (Singh 2008) reported that the Commerce Commission had 'closed down because it does not have funds to pay its staff'. It was reported that the commission contacted the Permanent Secretary for Industry, Tourism, Trade and Communications and later the Ministry of Finance but was told that 'the commission needed to have a further audit'. The chairman of the commission was reported as saying that 'the Commission has been audited by the Audit Office. Using audit process as a means of intimidation of an independent statutory body is unacceptable' (Singh 2008:1). The heavy reliance on



public funding was solved to some extent when an amendment to the *Commerce Act 1998*, known as the Commerce (Amendment) Promulgation 2009, was passed on 29 January 2009, which basically provided legal rights for the Commerce Commission to 'operate on a self-funding basis and for that purpose to charge fees in respect of the performance of its functions'.

About three weeks later, on 16 March 2009, the telecommunications price control order 2008 was revoked. The attorney-general and the minister responsible for telecommunications 'signed a notice revoking the price control that was put in place last year after a report was received from the Commerce Commission' (Fiji Government Online 2009:1). The attorney-general commented that the 'market itself will decide on the prices that are to be set within the market'. The stakeholders' submissions on the review of the telecommunications pricing order were made between February and June 2009. Publicly available reports and those in the media provided mixed signals. While the government and Vodafone Fiji Limited¹¹ publicly supported the move, based on pro-competitive economic principles, the Consumer Council of Fiji (2009) and the *Fiji Daily Post* (7 July 2009) had reservations.

Overall, the Fijian case shows evidence supporting the vulnerability of independent regulatory bodies to political influences. Further, there is evidence of the credibility of the telecommunications reform in Fiji being supported not by the independent regulator but by the deed of settlement: the Radisson accord.

Conclusions

The case studies shed light on four important issues in the early phases of telecommunications reform. First, although it is generally recognised that the role of an independent regulator provides some certainty to the reform process, its effectiveness can be hampered by lack of technical and financial capacity and political influences (as in Fiji and Samoa). Samoa and Vanuatu initially set up an interim regulator staffed by foreign experts. Vanuatu's regulator relies predominantly on the long-term financing of international donors for its sustainability. All three offices rely to a great extent on budgets appropriated by parliament. Further, the cases of Fiji and, to some extent, Samoa show evidence of an independent regulator's susceptibility to 'capture'. Given the lack of technical and financial capacity therefore, coupled with susceptibility to regulatory capture, the role of independent regulators in providing reform credibility is limited.

Second, donor agencies and regional and international institutions played important roles in facilitating the reform process through providing technical expertise and funding. Through the sharing of information between development agencies, regulatory lessons from each country have been shared, which will also benefit future reform programs. This is clear from the interconnection dispute in Samoa (which was the first country to reform, with World Bank/AusAID involvement), which has provided regulatory lessons for the other countries. The establishment of the interconnection agreement by the Government of Vanuatu before the granting of licences, as part of the deed of settlement, avoided the interconnection disputes that Samoa initially encountered. The global private telecommunications operator Digicel could also be sharing its local information



internationally, as shown by the reluctance to 'headhunt' top management officials of incumbents in markets opened later—Papua New Guinea, Tonga, Vanuatu and Fiji—after strong criticism in Samoa.

Third, the political will of all governments to intensify and speed up the liberalisation process could have led to the bypassing of some regulatory steps that could have been established before opening up the market. The regulation of the newly liberalised market in Vanuatu, based predominantly on the legal provisions of the deed of settlement and the licences granted to the operators, is a case in point. Another example is Fiji's proposed telecommunications authority—TAF—which was legalised as part of the Telecommunications Promulgation 2008, but has not yet been established.

Fourth, an issue closely connected with the political commitment by governments to liberalise markets quickly was the use of legal contractual agreements—deeds of settlement—identifying the rights and responsibilities of each stakeholder. The use of contractual agreements was effective in two ways. First, the terms and conditions, including compensation, for overriding the exclusivity of incumbent operators were outlined in the deeds, which legally bound all parties. Second, the responsibilities and legal functions of incumbent operators, competitors, the regulator and other key regulatory principles on telecommunications such as competition policy, interconnection agreements, numbering systems and spectrum management were outlined in the deed of settlement. The deed of settlement therefore provided a legal framework within which the sector could operate in the absence of legislation. Vanuatu is a case in point. Use of the deed might have been favoured by the stakeholders due to its industry-specific effects, the flexibility for all parties to negotiate and, most importantly, less vulnerability to political debate prolonging the process.

Notes

- ¹ See 'Ofa (2009:39–41) for a recent review of the debate over the effectiveness of independent regulators.
- ² A deed of settlement is a legal document commonly used to record the agreement between the relevant parties (usually the government, incumbent operators and new entrants) over the ending of monopoly rights of the incumbent telecommunications operator. The deed of settlement usually sets out the legal principles and detailed guidelines on the new rules and legal responsibilities of each party in a competitive market.
- ³ Vanuatu liberalised its telecommunications sector by means of a strong legal contract between stakeholders and without modern telecommunications legislation. A comprehensive telecommunications bill is, however, currently being drafted and discussed widely, which will mimic closely the terms and conditions of the legal contract.
- ⁴ A new Section 11 of the act replaced the original Section 11 in 2008. The amended Section 11 is discussed in the section on credibility problems.
- ⁵ With the remaining 10 per cent government owned by Communications Services Limited (CSL).
- ⁶ Dr John Philip Small, a consulting economist who was an expert witness for Digicel in the interconnection dispute, best captured the definition of interconnection by stating that '[w]hen a SamoaTel customer calls a Digicel customer, both networks are used to provide the call service. In this case SamoaTel will charge its customer for the call, and pay some of that money to Digicel in consideration for its help in completing the call. The amount paid will be the interconnection rate' (Supreme Court of Samoa 2008:2).
- ⁷ The basis for determining interconnection rates by the regulator is outlined in Section 36(1) of the *Telecommunications Act 2005*, which prescribes that determination will be cost based.



- ⁸ Any service provider whose gross revenue in a specific telecommunications market constitutes 40 per cent or more of the total gross revenue of all service providers in that market is designated by the regulator as the dominant service provider (Legislative Assembly of Samoa 2005:s.26[1]).
- ⁹ Jointly owned by Cable & Wireless and France Telecom.
- ¹⁰ The *Telecommunications Policy Statement 1998* was the basis for the creation of Amalgamated Telecom Holdings (ATH) and the sale of ATH shares to Fiji National Provident Fund (FNPF) and private investors. The policy was also the basis for the Telecommunications Bill 2006 (now passed as Telecommunication Promulgation 2008).
- ¹¹ Vodafone Fiji Limited was reported to have filed legal proceedings for judicial review of the price-control order (Vodafone Fiji Limited 2009).

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